86-361

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID C. ANDERSON, ET AL,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Circuit's adoption and implementation of issue preclusion in these cases so far departed from the standards for judicial review required by statute and by the fairness criteria defined in the prior decisions of this Court as to require the use of this Court's supervisory power?

PARTIES TO PROCEEDING

The petitioners included in this consolidated petition are:

> Patrick Lydon, David C. Anderson, Daniel C. Staffin, Richard S. Andrews, Timothy P. Clouser, John W. Gorman, Michael C. Lacy, Jack B. Shaul, Dennis P. Obermski, Donal O'Grady, Anna Lissak, Richard J. Brandis, John W. Holic, James F. Burgard, Brenda Conroy, Richard DeLutri, Jeffrey R. Ellis, Kenneth Popowitch, Donald Schuemann, Betty J. Murphy, Peter J. Piorkowski, Darryl Romashko, and Thomas A. Toepfer.

The respondents are:

> United States Department of Transportation, Federal Aviation Administration.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

A Writ of Certiorari is respectfully sought to review the final judgments of the United States Court of Appeals for the Federal Circuit in the eleven cases consolidated in this petition.[1]

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Federal Circuit in all eleven cases are unpublished, but are reproduced in Appendix A *infra*.

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[1] By order of the Chief Justice, the petitioners' motion for extension of time to file a consolidated petition to September 2, 1986, was granted on July 25, 1986.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). The jurisdiction of the Federal Circuit Court of Appeals was initially invoked pursuant to 28 U.S.C. 1295 (a)(9).

STATUTES AND CIRCUIT RULE INVOLVED IN THE CASE

5 U.S.C. 7703 (c) provides in pertinent part:

> In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action, findings or conclusions found to be—
>
> (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule or regulation having been followed; or
>
> (3) unsupported by substantial evidence.

F.R.A.P. 34 (a) provides in relevant part:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners are all former air traffic controllers who were terminated in 1981 based upon charges that they participated in the PATCO strike.

Although each of the petitioners have asserted unique substantive and procedural defenses through the Merit

Systems Protection Board procedures and in their appeals to the Federal Circuit, the petitioners are cognizant of the limited resources of this Court and the logical necessity to limit the Court's discretionary review to cases involving questions of significant importance.

In deference to this criteria the petitioners do not ask the Court to review the merits of their individual cases.

Instead, the petitioners limit the issues herein to the deprivation of basic rights to litigate their cases before the Federal Circuit, resulting from that Circuit's adoption and application of a special but fundamentally flawed process for deciding the controller litigation. In this vein, the unique substantive defenses of some of the petitioners will be stated for the sole purpose of illustrating the significance of the errors which attached to the proceedings before the Federal Circuit.

1. THE ADOPTION OF ISSUE PRECLUSION—THE FEDERAL CIRCUIT'S "LEAD CASE" PROCEDURE.

Shortly after the U.S. Court of Appeals for the Federal Circuit was formed in October, 1982,[2] it faced a potential influx of appeals in crisis proportions. This situation resulted from the convergence of two factors: (1) the record number of pending Merit Systems Protection Board appeals, due to the air traffic controller litigation, for which judicial review as of right was guaranteed by law;[3] (2) the amendments to 5 U.S.C. 7703 (b) (1), which transferred to the Federal Circuit exclusive jurisdiction

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[2] Pub. L. 97-164, Title 1. Section 144 (April 2, 1982) 96 Stat. 45.

[3] 5 U.S.C. 7703 (1982).

of MSPB appeals which had previously handled by the Court of Claims and the Courts of Appeals for all the circuits.[4]

The decision to resort to issue preclusion as a means of resolving the anticipated crisis was apparently made by a single judge of the Federal Circuit, under unusual circumstances.

In February, 1982, a judge of the Federal Circuit granted a motion filed by the Department of Transportation to suspend all processing of appeals filed by air traffic controllers, in order to pursue a "lead case" approach by which that judge expected the Federal Circuit to be able "to determine most, or perhaps all of the legal issues in the air traffic controller litigation."[5]

Although this order was to have a profound impact on all of the controller-litigants, the motion was filed and the decision made in the complete absence of notice of those who would be affected. The judge's notice, which announced a "lead case" approach on behalf of the entire Federal Circuit, was issued in connection with a motion raised in three cases.[6] No other controller-appellants, none of these petitioners were afforded any opportunity to respond to the government's motion.

At the time the lead case procedure was adopted, most of the MSPB cases which would make up the eleven lead

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[4] See also, 28 U.S.C. 1295 (a) (9).

[5] *In re Air Traffic Controller Litigation* (Fed. Cir., February 24, 1983) at 2.

[6] *Ferrando* v. *Department of Transportation,* No. 83-687 (Fed. Cir. 1983); *Erickson* v. *Department of Transportation,* No. 83-688 (Fed. Cir. 1983); *Zullo* v. *Department of Transportation,* No. 83-689 (Fed. Cir. 1983).

cases had not yet even been selected or decided by the MSPB itself. Moreover, under applicable law, generally employees but not Federal agencies have the right to appeal to the Federal Circuit.[7] Hence the judge responsible for adopting the lead case approach must have assumed, two to three months before the MSPB decided several of these cases, that the agency would win, that judicial review would be sought, that the cases would present issues common to the other litigants, that the selected cases would be typical and the representation adequate.

If these assumptions were wrong, these petitioners were helpless to challenge them. From February, 1983, to January, 1985, all controller cases, other than those *selected*[8] as the lead cases, were frozen.

After the MSPB decided all of the lead cases, the Federal Circuit implemented the prior issue preclusion order by designating five judges to serve on a panel to decide the lead cases. Although non-lead case controllers were permitted to file briefs as *amici curiae*, they were limited to the issues formed by those having lead case status and by the records of these cases.[9]

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[7] The single exception to the non-appealability of MSPB cases in which the agency action is reversed is in regulation-impact cases brought by the Office of Personnel Management, 5 U.S.C. 7703 (d).

[8] No explanation was ever given as to what method the Court employed in designating a case as a lead case.

[9] Several of the Federal Circuit's lead case decisions, notably *Adams* v. *Department of Transportation*, 735 F 2d 488 (Fed. Cir., 1984), summarily rejected arguments from *amici* which were based upon record evidence adduced in hearings other than the selected lead cases.

In May, 1984, when the five judge panel issued its decisions in the eleven lead cases, all in favor of the agency, it served notice on the other controller-appellants that their cases would continue in a suspension status pending the final disposition by the Supreme Court, or the time for doing so had lapsed.[10] The notice also warned attorneys representing controllers against maintaining frivolous appeals.

Some of the lead case appellants subsequently filed petitions for certiorari, which were denied by this Court. Final disposition of what were characterized as the controller lead cases was determined in December, 1984.

2. APPLICATION OF ISSUE PRECLUSION — SPECIAL RULES FOR CONTROLLER-APPELLANTS.

The Federal Circuit, apparently convinced it had effectively decided most, if not all of the issues in the controller litigation, albeit in the total absence of any input on that question from the non-lead case controller-appellants, proceeded in the aftermath of the lead case dispositions with an issue preclusion format.

In December, 1984, the Federal Circuit announced that the suspension affecting over 99% of the controller appeals would be lifted on January 10, 1985. However, those wishing to proceed were required to file a second petition for review. If a second petition were not filed, the notice provided, the appeal would be dismissed. The attorneys for the controllers were again warned not to pursue frivolous appeals.[11]

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[10] Notice to Counsel and Petitioners in ATC litigation, (Fed. Cir. May 18, 1984).

[11] Notice to counsel in ATC litigation (Fed. Cir. December 10, 1984).

In other post-lead case orders, the Federal Circuit simply abandoned the statutory requirements for deciding appeals brought pursuant to 5 U.S.C. Section 7703.

For example, Section 7703 (c) requires the Federal Circuit to "review the record" in employee-appeals from the MSPB. In the case of every Section 7703 appellant — other than those among the controller class of 1981 — the Clerk of the Federal Circuit receives from the Secretary of the MSPB, a certified copy of the record before the Board.

In these cases, the MSPB was advised not to certify or submit these records to the Court.

Next, the Court decided to abandon its own rules regarding the random assignment of rotating panels of judges,[12] and the requirements of statute,[13] by consciously assigning the two identical panels which had participated in the lead cases to decide the controller cases, to the exclusion of all other judges of the Circuit.

The first ninety-nine controller cases decided after the lead case disposition were all assigned to one of two identical three judge panels. With a few exceptions, all of these cases were decided on an issue preclusion format, with short, identically worded form decisions, completely devoid of adjudicative reasoning, with the sole justification for the result being some unexplained reference to one or more of the lead cases.

Apparently in August, 1985, in yet another policy decision not announced to the litigants affected thereby, the Federal Circuit decided to prohibit oral argument in the

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[12] C.A.F.C. Rule 3(b) (1984).

[13] 28 U.S.C. 46(b).

remaining controller cases. Although no oral arguments were scheduled on any controller cases between August, 1985 and March, 1986, the policy to abandon the requirements of F.R.A.P. 34 (a) did not come to light until January, 1986, when the Clerk of the Federal Circuit disclosed the policy to one of the controller's attorneys.[14]

A motion filed with the Court by the same attorney, asking the Court to comply with the applicable statutes and appellate rules governing assignment of panels and the procedures for declining oral argument, was denied by the Federal Circuit, *in banc,* on the ground the harm to the movant had not yet occurred.[15]

In spite of the denial of the motion to gain compliance, the Federal Circuit did make adjustments to both the assignment and oral reply procedures applied to these controllers.

As to the oral reply procedures, the Clerk of the Federal Circuit issued a notice to the remaining controller-appellants, including these petitioners, to present reasons why oral argument would be necessary. Pursuant to F.R.A.P. 34, such a notice is given only after an existing panel of three judges, after reviewing the record and briefs, has unanimously voted that oral argument is unnecessary. At the time the Clerk issued the notices in the cases of these petitioners, none of the cases had even been assigned to a panel, and some of the cases were not even fully briefed.

In light of this, the petitioners' attorney wrote a letter to the Clerk of the Federal Circuit, which requested a copy

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[14] Complaint of Attorney Richard Leighton to the Judicial Conference of the United States, February 25, 1986.

[15] Order of February 7, 1986, denying Attorney Leighton's Motion to gain Court compliance with its own rules.

of the Court's order which led to his notice on the oral argument issue. The Clerk responded, in the pertinent part, that he was "unable to comply with (the) request to provide a copy of a court order regarding the request for oral argument because there is no such court order."[16]

After this disclosure was added to the matters brought to the attention of the Judicial Conference, the Clerk sent an unsolicited letter amending that statement. In the second letter, the Clerk explained that the Rule 34 Notice was actually sent on the verbal order of the entire court.

On March 24, 1986, the Federal Circuit also modified its practice regarding the assignment of panels to the remaining controller cases. The number of panels was increased to more closely simulate ordinary rotation. However, the cases were not assigned on a blind rotation basis.

In the context of the issue preclusion format, the changes involved more form than substance. Within about a month after assignment of the controller appeals to the new panels, the Court issued a volume of almost identically worded, form decisions which were, with few exceptions, completely devoid of any discussion of the legal and factual issues raised. As evident from the decisions in Appendix 1 *infra,* all of petitioners cases herein were treated under the issue preclusion format. In some cases, the wording in the form decisions issued by different panels was identical. In most others, it was nearly identical.

In sum, the appeals of these petitioners were rejected based upon the record of other litigants and arguments considered in the light of the other records.

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[16] Attachment to Complaint of Phillip S. Wood to Judicial Conference of the United States, March 17, 1986.

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS BELOW SO FAR DEPART FROM THE REQUISITES FOR FAIR ADJUDICATION, AS DEFINED BY STATUTE, RULE AND THE PRIOR DECISIONS OF THIS COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS AND GUIDANCE.

INTRODUCTION

In setting forth a chronology of facts which give rise to the petitioners complaint that they were subjected to fundamentally defective procedures below, the petitioners do not wish to imply a belief that they were the object of sinister conspiracy. However, errors in an adjudicative process can be just as real and prejudicial even if motivated out of legitimate attempts to maintain efficiency or judicial economy in the face of a burdensome case load.

A. The process below was fundamentally defective.

Each of the petitioners had an appeal as of right to the Federal Circuit, 5 U.S.C. 7703. Like any other appellant seeking review of an MSPB decision, each of them had a right to have their own individual record reviewed on a substantial evidence standard, to have the Court apply the applicable statutes, regulations and case law to the facts in the record and to have the Court rule on the legal sufficiency of the procedures employed to terminate their careers.

It is obvious from the facts set forth *supra*, and the form of the decisions reproduced in the Appendix, that these basic statutory rights to a fair process of judicial review were effectively denied, or sacrificed in favor of an issue preclusive, lead case method of adjudication.

This Court has, of course, recognized that in some litigation situations a proper application of issue preclusion may serve the interests of conserving judicial resources without denying the affected litigants a full and fair opportunity to litigate their cases. E.g. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found,* 402 U.S. 313 (1971); *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979); *Montana* v. *United States,* 440 U.S. 147 (1979).

The anomaly of the controller litigation is that a form of issue preclusion was initially sought by an attorney for some of the controllers in a motion for national consolidation filed in 1981. *Trick* v. *Department of Transportation,* MSPB No. HQ 075281F1113 (1981). As tempting as that suggestion must have been to the MSPB, which faced an unprecedented case load due to the controller appeals, the Board, unlike the Court below, recognized the necessity of issuing notice to all of the appellants who could have been affected and of providing these litigants an opportunity to respond (*id.*). After reviewing these responses the MSPB denied the motion, noting there was a dissimilarity in factual defenses, issues and even procedures applied among the various FAA facilities. Adequacy of representation was also a factor, as was the inability to select a case or cases typical of others.

Certainly, where it is deemed inappropriate to try cases under an issue preclusion format, the reasons which prompted rejection of the doctrine in the first instance take on even greater force in the appellate review of cases separately litigated, with different evidentiary records.

Even ignoring, however, the basic inappropriateness of the issue preclusion device to the Federal Circuit's review, the process by which a single judge, on behalf

of the Court, adopted the lead case format must, at a minimum, be characterized as repugnant to fair adjudication.

First, it is unquestionable that the government's motion for the Court to adopt the lead case procedure should have been served on all of the controller-appellants whose rights were potentially affected. Clearly, prior to granting such a motion, the Circuit Judge should have afforded those appellants whose cases were to be frozen, and rights truncated, some opportunity to respond. Fundamental due process required at least that much.

Second, some caution should have been exercised in the selection of the lead cases to avoid use of atypical or poorly litigated cases as a preclusion to others where the facts and issues were, perhaps, better developed. In the instant case the Court apparently allowed the government the right to select the cases which would receive the lead case treatment to the exclusion of the others.

This is no frivolous concern, particularly in cases where, as here, there is a complete lack of mutuality among the affected parties. One of the primary misgivings expressed by Professor Currie concerning the trend toward abandonment of mutuality in issue preclusion cases is the possibility that a litigant's opponent may obtain unfair advantage by assuming the initiative on a threshold issue such as the designation of a lead case. See Currie, Civil Procedure, *The Tempest Brews,* 53 Calif. L. Rev. 25, 27 (1965):

> . . . to jettison the mutuality rule without some saving provision might lead to * * * injustice in those cases in which, by reason of his opponent's astute employment of the initiative, the party against whom the former judgment is invoked did not, in the former action have, in a realistic sense, a full and fair opportunity to defend.

To illustrate the decisive nature of the process of selection of a "lead case" to the cases of these petitioners, we briefly summarize the relevant facts in some of the petitioners' records, and compare with the facts of the "lead" case which issue precluded petitioners' cases, according to the Federal Circuit's decisions.

For example, petitioner Richard DeLutri asserted a legal excuse for his absence from duty, in that he was incapacitated due to a spinal problem later diagnosed as an intrameduliary spinal cord tumor. At his hearing, his incapacity was corroborated by his treating physician, his wife, four other witnesses and his supervisor. All of the agency witnesses confirmed that the prescription medication he was ingesting would, of itself, have incapacitated him from duty. He introduced corroborating medical documents and even the full report of a polygraph examination which he took, and passed, and which confirmed his absence was not due to strike participation. His report of his condition to his employer was according to the facility practice and policy, as the agency chief confirmed. His supervisor even corroborated Mr. DeLutri's additional effort to reach the supervisor at his home. This evidence was not only uncontraverted by the agency, the agency witnesses substantially corroborated it. The only agency evidence introduced against Mr. DeLutri was anonymous hearsay, i.e. agency attendance records which showed that some unidentified agency official marked Mr. DeLutri absent without leave. In the course of the hearing even the hearsay was discredited, as the agency admitted it had been altered long after the dates in question.

Mr. DeLutri's case was issue precluded by the lead case *Triola* v. *Department of Transportation*, 769 F 2d 760

(1985).[17] Aside from the category of the substantive defenses, incapacity, the two cases were not analogous in any way.

The *Triola* appellant appeared *pro se*. He claimed he was ill or suffering allergy on the relevant dates, but admitted making no attempt to report his incapacity to the agency. He neither sought nor received medical treatment. He presented no corroborative evidence of any kind.

Even ignoring the lack of substantial identity of the facts and the other infirmities in the *post hoc* adoption of the lead case format, it appears absurd to select the case of an unrepresented appellant who had presented, at best, an undeveloped record and, at worst, a frivolous case, for purpose of issue preclusion.

The *Triola* case was also cited by the Federal Circuit to issue preclude the cases of petitioners Patrick Lydon and Thomas Toepfer.

Mr. Lydon's wife had prematurely given birth to a baby boy on July 31, 1981, three days before the PATCO strike. The petitioner's son was born with a total weight of one and a half pounds and was given only a 20% chance of survival. Mr. Lydon immediately reported the family emergency to his supervisor, who granted and recorded emergency annual leave for the duration of the crisis. Over the next several weeks, while the strike was going

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[17] The *Triola* case was not even one of the eleven cases selected for lead case treatment before the 5 judge panel. It was heard by an ordinary 3-judge panel. The petitioner appeared *pro se* and the decision rendered in July, 1985. Six months later the case was elevated to the lead case status by notice of the Clerk on February 7, 1986. This was purely an afterthought, probably due to the fact that none of the 11 lead cases involved incapacity.

on, Mr. Lydon was keeping a constant vigil at his baby son's room at a hospital, a period of time in which the Lydon boy had, on four occasions, stopped breathing. A few days after the PATCO strike began, and in the midst of this crisis, an agency official whose identity has never been revealed, marked Mr. Lydon absent without leave and he was fired.

Mr. Toepfer underwent major surgery for a prostrate problem in late July, 1981. He was on approved sick leave during his post-operative recovery for the entire month of August, 1981. In an effort to return to work to assist an agency which needed his services, he asked his doctor to allow him to return on September 7, 1981, and he so notified the agency. When he drove to work on the return date he became weak and discovered he was bleeding from his penis. When he discussed the situation, by phone, with his facility area manager, the manager angrily told him that his failure to report would be construed as striking. That threat was carried out and Mr. Toepfer, a man who had three times crossed the picket line to personally advise the agency of his situation, was fired.

B. The improper denial of oral argument was prejudicial.

The curtailment of important litigation rights, without adherence to the Court's own rules, is significant in any case. The abandonment of the F.R.A.P. 34 (a) procedures in the context of these cases was particularly prejudicial.

Given the fact that these petitioners had already been denied any notice or opportunity to be heard on the government's motion and the Court's adoption of the issue preclusion format, the oral argument procedure could have served an even greater role in the adjudicative pro-

cess than its usual function in sharpening the issues and encouraging dialogue on decisive facts or points of law.

While denial of oral argument may be committed to the sound discretion of a panel, which, under Rule 34 (a), may by unanimous vote abrogate the right, the discretion of a Circuit panel is not the issue before this Court. Instead, as the facts and record show, *supra,* the denial of the oral argument involved herein was accomplished in the abstract, prior to the assignment of the case to a 3 judge panel.

This flagrant abandonment of Rule 34 (a) procedures, and the consequent loss of important rights should, of itself, justify invocation of this Court's supervisory powers.

C. The Federal Circuit's decisions in the petitioners' cases are impermissibly devoid of adjudicative reasoning.

As apparent from the decisions reproduced in the appendix, the lower court, consistent with its issue preclusion format, found it unnecessary to address specific facts and issues or to otherwise state the reasons for its judgment other than by way of a vague and unexplained reference to one or more of the lead cases.

It is impossible to determine whether the Federal Circuit fulfilled the statutory mandate of reviewing the record and determining the presence or absence of substantial evidence.

The form decisions involved here also cannot be distinguished from the decisions of the same ilk which were issued by other panels in the controller cases. In some instances the decisions contain identical wording, even though two supposedly different 3 judge panels decided them.

Although this Court has, in some contexts, expressed reluctance to carve out an inflexible rule on the precise degree of judicial reasoning it will consider sufficient, it has not hesitated to remand cases in which the analysis is so lacking as to require the Court to speculate as to the specific basis underlying the opinion, See, e.g. *Dennison Manufacturing Co.* v. *Panduit Corp.*, No. 85-1150 (S. Ct. April 21, 1986) —— U.S. —— (1986).

CONCLUSION

II.

For the foregoing reasons, it is respectfully requested that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DAVID ANDERSON, et al.,*

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1067
MSPB Docket No. CH075281F0873

DECIDED: April 25, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decisions of the Merit Systems Protection Board, affirming the petitioners' removal by the Federal Aviation Administration, Department of Transportation, are *affirmed.*

* The following petitioners are included in this appeal: Daniel C. Staffin, MSPB Docket No. CH075281F3008; Richard S. Andrews, MSPB Docket No. CH075281F0890; Timothy P. Clouser, MSPB Docket No. CH075281F1243; John W. Gorman, MSPB Docket No. CH075281F1670; Michael C. Lacy, MSPB Docket No. CH075281F2140; Jack B. Shaul, MSPB Docket No. CH075281F2928; Dennis P. Obremski, MSPB Docket No. CH075281F2545; Donal O'Grady, MSPB Docket No. CH075281F2538; Anna Lissak, MSPB Docket No. CH075281F2223.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Johnson* v. *Department of Transportation, FAA,* 735 F.2d 510 (Fed. Cir. 1984); *see also Adams* v. *Department of Transportation, FAA,* 735 F.2d 488 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984), and *Anderson* v. *Department of Transportation, FAA,* 735 F.2d 537 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984). Petitioners have not rebutted the *prima facie* showing of strike participation made by the agency, *Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984), and have not shown any harmful procedural errors, *Handy* v. *U.S. Postal Service,* 754 F.2d 335 (Fed. Cir. 1985).

The decisions appealed from were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, were not obtained without procedures required by law, rule, or regulation having been followed, and were supported by substantial evidence. 5 U.S.C. §7703(c) (1982); *see Hayes* v. *Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

This appeal is frivolous. Counsel has failed to distinguish the precedents of this Court in any meaningful way. Damages and costs of $100.00 are assessed in favor of the government against counsel, to be paid within 30 days of the date of this opinion. Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD J. BRANDIS, ET AL.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2813.

MSPB Decision Nos. CH075281F1066
and CH075281F1866.

DECIDED: April 14, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges*.
PER CURIAM.

DECISION

The decisions of the Merit Systems Protection Board, affirming petitioners' removal by the Federal Aviation Administration, Department of Transportation, are *affirmed*.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Anderson* v. *Department of Transportation, FAA*, 735

F.2d 537 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984); and *Adams* v. *Department of Transportation, FAA,* 735 F.2d 488 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD J. BRANDIS, ET AL.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2813

MSPB Decision Nos. CH075281F1066
and CH075281F1866.

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/ *Francis X. Gindhart*
Francis X. Gindhart, Clerk

5/16/86
Date

cc: Mr. Phillip S. Wood
Ms. Hillary A. Stern, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES F. BURGARD,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2815

MSPB Decision
No. CH075281F1131

DECIDED: APRIL 14, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Anderson* v. *Department of Transportation, FAA,* 735 F.2d 537 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984);

and *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRENDA L. CONROY,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1061

MSPB Docket No. CH075281F1273

DECIDED: APRIL 14, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges*.
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed*.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issues have been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

The agency established its *prima facie* case by presenting evidence that Conroy did not report to work on August 3 and 4 and for her deadline shift starting at 11:00 PM on August 5, 1981. *See Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984). For two reasons, we reject Conroy's argument that she overcame the agency's *prima facie* case by showing that the deciding official issued Conroy's letter prior to her deadline shift. First, under *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984), Conroy's admitted strike participation even on one day is enough to sustain her removal. Second, because Conroy offered no evidence that she knew, before her deadline shift, that her notice of removal had been issued or that the agency prevented her from reporting to work, she has not carried her burden to show that the asserted procedural error was harmful. *See Handy* v. *U.S. Postal Service*, 754 F.2d 335 (Fed. Cir. 1985).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).*

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* Conroy's motion to remand for consideration of newly discovered evidence of fraud in the agency records is inadequately supported and is denied.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD DELUTRI,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1063

MSPB Docket No. CH075281F1377

DECIDED: APRIL 11, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Triola* v. *Department of Transportation, FAA,* 769 F.2d 760 (Fed. Cir. 1985).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

This appeal is frivolous. Counsel has failed to distinguish the precedents of this Court in any meaningful way. Damages and costs of $500.00 are assessed in favor of the government against counsel, to be paid within 30 days of the date of this opinion. Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD DELUTRI,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1063

MSPB Docket No. CH075281F1377

Before BALDWIN, NIES, and ARCHER, *Circuit Judges*.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing *in banc* is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

5/16/86

cc: Mr. Phillip S. Wood
Ms. Sandra P. Spooner, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JEFFREY R. ELLIS, ET AL.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2816.

MSPB Decision No. CH075281F1465.

DECIDED: April 14, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decisions of the Merit Systems Protection Board, affirming petitioners' removal by the Federal Aviation Administration, Department of Transportation, are *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

Petitioners' arguments are adequately treated in the presiding official's opinion dated January 18, 1983. We affirm on the basis of that opinion.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JEFFREY R. ELLIS, ET AL.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2816.

MSPB Docket No. CH075281F1465.

Before RICH and DAVIS, *Circuit Judges*, and COWEN, *Senior Circuit Judge*.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

5/27/86
Date

cc: Mr. Phillip S. Wood
Ms. Hillary A. Stern, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PATRICK LYDON,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2817.

MSPB Decision No. CH075281F2258.

DECIDED: April 14, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming petitioner's removal by the Federal Aviation Administration, Department of Transportation is *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Triola* v. *Department of Transportation, FAA,* 769 F.2d 760 (Fed. Cir. 1985); *Anderson* v. *Department of Transportation, FAA,* 735 F.2d 537 (Fed. Cir.), *cert. denied,* 105

S. Ct. 432 (1984); and *Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PATRICK LYDON,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2817

MSPB Decision No. CH075281F2258

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

5/16/86
Date

cc: Mr. Phillip S. Wood
Ms. Eva M. Plaza, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BETTY J. MURPHY,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1066

MSPB Docket No. CH075281F2465

DECIDED: APRIL 23, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

We are not persuaded that the Board erred in determining that petitioner's testimony regarding a personal emergency and thereafter confusion about her status and deadline shift was insufficient to rebut the *prima facie* case against her, particularly in view of her failure to contact

the agency for emergency leave and clarification. *See Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984), and *Anderson* v. *Department of Transportation, FAA,* 735 F.2d 537 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); *see Hayes* v. *Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BETTY J. MURPHY,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1066
MSPB Docket No. CH075281F2465

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing *in banc* is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

6/23/86
Date

cc: Mr. Phillip S. Wood
Ms. Sandra P. Spooner, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETER J. PIORKOWSKI,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2819

MSPB Docket No. CH075281F2643

DECIDED: APRIL 14, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issues have been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

Before the board, Mr. Piorkowski offered several reasons why his absence without approval during the strike should be excused. Each was rejected by the board. Mr. Piorkowski has failed to persuade us of any error in the board's analysis, *see Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984), or that the board's failure to accept the explanations for his absences was improper. *See Gries-*

senauer v. *Department of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985).

We affirm on the basis of the Board's opinion because the board's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); *see Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

This appeal is frivolous. Counsel has failed to distinguish the precedents of this Court in any meaningful way, or has presented arguments which clearly have no merit. Damages and costs of $100.00 are assessed in favor of the government against counsel, to be paid within 30 days of the date of this opinion. Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DARRYL ROMASHKO,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1065
MSPB Docket No. CH075281F2786

DECIDED: APRIL 23, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges*.
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed*.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984); *see also Anderson* v. *Department of Transportation, FAA,* 735 F.2d 537 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984), and *Adams* v. *Department of Transportation, FAA,* 735 F.2d 488 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DANIEL ROMASHKO,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1065
MSPB Docket No. CH075281F2786

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing *in banc* is under consideration.

FOR THE COURT

/s/ By: Diane Frye, Chief Deputy Clerk
Francis X. Gindhart, Clerk

5/21/86
Date

cc: Mr. Phillip S. Wood
Ms. Sandra P. Spooner, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS A. TOEPFER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2822
MSPB Docket No. CH075281F0979

DECIDED: April 11, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed.*

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

The agency established its prima facie case by showing that Toepfer did not report to work for his scheduled deadline shift on September 7, 1981. *See generally Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984). Toepfer's testimony that he was physically incapacitated during his deadline shift does not rebut the agency's prima facie case. *See Anderson* v. *Department of Transportation, FAA,* 735 F.2d 537 (Fed. Cir.), *cert. denied sub nom.,*

105 S. Ct. 432 (1984). We affirm on the basis of the presiding official's consideration and discussion of the evidence on which Toepfer bases his defense.

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

This appeal is frivolous. Counsel has failed to distinguish the precedents of this Court in any meaningful way. Damages and costs of $100.00 are assessed in favor of the government against counsel, to be paid within 30 days of the date of this opinion. Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS A. TOEPFER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-2822
MSPB Docket No. CH075281F0979

Before BALDWIN, NIES, and ARCHER, *Circuit Judges*.

ORDER

A petition for rehearing having been filed in this case,
UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

5/16/86
Date

cc: Mr. Phillip S. Wood
Ms. Eva M. Plaza, DOJ

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD S. ANDREWS, et al.[1]

v.

DEPARTMENT OF TRANSPORTATION

DOCKET NUMBER
CH075281F0890

OPINION AND ORDER

Appellants were removed from their positions of Air Traffic Control Specialists at the Chicago Air Route Traffic Control Center in Aurora, Illinois, based on charges of: (1) striking against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence or absence without leave (AWOL). Appellants' removals were sustained by the Chicago Regional Office of the Board.

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[1] All 23 appellants and their individual docket numbers are listed on the attached appendix. Appellants' appeals to the Regional Office were consolidated for purposes of hearing and issuance of initial decisions under three lead cases as follows: appellants Andrews, Clouser, Conroy, DeMar, Gorman, Hamer, Lacy, Murphy, Nicholas, Obremski, Romashko, Shaul, Simms, Staffin, and Taylor under *Andrews* v. *Department of Transportation,* MSPB Docket No. CH075281F0890 (Initial Decision dated February 1, 1983); appellants Dwight Anderson, Cichon, Finnegan, Lissak, Marchiel and Olson under *Lissak* v. *Department of Transportation,* MSPB Docket No. CH075281F-2223 (Initial Decision dated January 20, 1983); and appellants David C. Anderson and Tomasi under *Anderson* v. *Department of Transportation,* MSPB Docket No. CH-075281F0873 (Initial Decision dated January 29, 1983). Appellants have filed a total of eight (8) petitions for review which raise several identical issues of facts and law which involve the same air traffic control facility. Therefore, these petitions are hereby further consolidated pursuant to 5 U.S.C. § 7701(f).

In their petitions for review, appellants allege various errors by the presiding officials in sustaining their removals.

Appellants contend that they were physically locked out of the agency's facility because the main access gate to the facility was locked and chained. However, the evidence shows that the gate was closed for a brief period, from approximately 9:00 a.m. to 11:00 a.m. on August 5, 1981, and that the gate was opened to allow vehicles to enter. *Andrews* Hearing Transcript (Tr.) at 96, 294. Further, the walk-through gate to the facility was never closed. *Id.* at 96, 494. Thus, appellants have failed to show that they were denied access to the agency's facility.

Also, appellants contend that the agency denied them the right to an election of appeal remedies through the Board's appeals process or through grievance and arbitration as provided by 5 U.S.C. §§ 7701 and 7121, respectively. Appellants base their contention solely on the fact that the agency notified them in their removal notices that it had filed an unfair labor practice charge against their union, the Professional Air Traffic Controllers Organization (PATCO), and that, if PATCO was decertified, the grievance and arbitration process might not be available to them. We find nothing in this information to constitute a denial of appellant's right to an election of appeals remedies and that appellants' contention in this regard to be without merit. *See Martel* v. *Department of Transportation,* MSPB Docket No. BN075281F0558 at 17-18 (April 25, 1983).[2]

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[2] The Board has resolved the remaining issues common to several of these air traffic controller appeals in the following cases: *Schapansky* v. *Department of Transportation,* MSPB Docket No. DA075281F1130 at 6 n.2, and 10-12 (October 28, 1982) (*prima facie* case of strike participation, reasonableness of the penalty of removal upon consideration of mitigation factors, including disparate treatment, and nexus between striking and efficiency of the service); *Baracco* v. *Department of Transportation,* MS

The following appellants have raised factual issues peculiar to their individual cases:

Ralph Olson

Appellant Olson alleges that he suffered from alcoholism and contends that the agency erred in failing to refer him to an alcohol rehabilitation program prior to removing him as is required by 42 U.S.C. § 4561. Appellant relies, *inter alia,* on the Board's holding in *Ruzek* v. *General Services Administration,* 7 MSPB 307 (1981), in sup-

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[2] (Continued)
PB Docket No. DC075281F0895 at 9, 14 n.6, and 17 (April 25, 1983) (effect of requirement of response to charges "within 7 calendar days" after receipt of proposal notice, failure of agency to designate reply official with authority to recommend final decision, and other procedural errors in general on agency action); *Campbell* v. *Department of Transportation,* MSPB Docket No. DE075281F0674 at 7, 8 n.9, and 12-16 (April 25, 1983) (striking for any duration as ground for removal and appellants' burden of proof in ascertaining their individual deadlines, in seeking clarification of existing ambiguities, and in establishing agency's denial of readmission to its facility during the notice period); *Anderson* v. *Department of Transportation,* MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983) ("command influence" of public statements made by President Reagan and high level agency officials during the strike and invocation of 5 U.S.C. § 7513(b)(1) to shorten the notice period); *Johnson* v. *Department of Transportation,* MSPB Docket No. DC075281F0998 at 11-13 (November 10, 1982) (standard for establishing a defense of coercion or duress). *See also Malone* v. *Department of Justice,* MSPB Docket No. DA03516210042 at 3 (January 19, 1983) (Board's lack of authority to determine constitutionality of statutes); *Desiderio* v. *Department of the Navy,* 4 MSPB 171-72 (1980) (AWOL) alone as cause for removal); and *Weaver* v. *Department of the Navy,* 2 MSPB 297, 299 (1980) (deference due presiding official's findings of fact and credibility determinations).

port of his contention. In *Ruzek,* however, we held that the agency is obligated to offer rehabilitative assistance only where the employee's alcoholism affects his work performance. *Ruzek, supra,* at 311, 312. Here, appellant has failed to show that his absence during the strike was caused by alcohol-related problems. Rather, as the presiding official correctly found, appellant's stated reason for failing to report for duty was alleged coercion. Thus appellant has failed to show that he was entitled to an opportunity for rehabilitation.

Oscar Taylor, James E. Simms, Glennetta Nicholas, and Louis Hamer

These appellants, in support of their assertion of coercion, contend that they were "particularly vulnerable" to psychological pressure because of their race (black) and their developmental (trainee) status in a white dominated occupation. Appellants presented a psychologist, Dr. Ralph Van Atta, who testified in support of that allegation. Appellants, however, have not alleged that their removals were based on racial discrimination. The Board has specifically rejected allegations of "jeopardy to career advancement" in *Johnson* v. *Department of Transportation,* MSPB Docket No. DC075281F0998 at 8-9 and n.13. These appellants have failed to establish a defense of coercion as contemplated in *Johnson, supra,* at 11-13. Appellants failed to show that they were victims of personal threats or other intimidating conduct "sufficient to instill in [them] a reasonable fear of physical danger to [themselves] or others, which a person of ordinary firmness would not be expected to resist." *Id.* at 11-12. On the contrary, appellants merely recounted rumors of threatening and intimidating conduct directed at others, *see Andrews* Tr. at 2362, 2437-2438, overheard threats made in reference to others, *see id.* at 2505-06, and indirect threats relating to career development, *see id.* at 2309, 2505-06, 2491. Thus, appellants failed to successfully rebut the agency's *prima facie* case of strike participation.

Anthony Tomasi

The record shows that this appellant's deadline for returning to work was August 8, 1981. On August 7, 1981, appellant was informed by his supervisor that he would be permitted to return to work if he appeared for his deadline shift on August 8. However, on August 7, subsequent to the discussion with his supervisor, appellant received the agency's notice of his proposed removal dated August 6, 1981. The presiding official did not consider the possible harmful effect of the agency's procedural error in prematurely issuing the proposal notice. *See Bangerter* v. *Department of Transportation,* MSPB Docket No. SL075281F0279 at 38 (September 27, 1983). The presiding official found appellant's receipt of the proposal notice prior to his deadline "not controlling" since appellant failed to show that, even if he had notified the agency of the error, he would not have been permitted to return. *See Anderson,* Initial Decision at 26.[3]

Appellant testified that, upon his receipt of the proposal notice, he believed that he would not have been permitted to return to work since he was aware that other controllers who received similar notices were not allowed to return. Tr. at 528. Appellant also testified that he would have returned to work for his August 8, deadline had he not received the notice of proposed removal. Tr. at 504. Under these circumstances, we find that appellant established that the agency's premature issuance of the proposal notice constituted harmful procedural error. *See Bangerter, supra,* at 39. Therefore, the agency action removing appellant Tomasi is not sustained.

Further, appellants contend that they were erroneously suspended by the agency during the notice period. In the *Andrews* and *Anderson* consolidated initial decisions, the

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[3] The presiding official also rejected appellant's claim that his failure to report for duty at his deadline shift was based on coercion. In view of our disposition of this appellant's case, it is not necessary to address this issue.

presiding official found that the agency had constructively suspended those appellants and, in effecting their suspensions, had committed procedural error. However, she determined that the appellants had not shown harmful error. Because we find that the presiding official erred in finding improper suspension, we hereby REOPEN the petitions for review filed by the appellants covered by those decisions to address this issue. 5 C.F.R. § 1201.117.[4]

In *Andrews,* the presiding official based her finding of erroneous suspension on testimony by the chief of the agency's facility and on the agency's General Notice (GENOT) 1/128. The chief of the facility testified that striking controllers would not have been afforded an unconditional right to return to work during the notice period and that whether or not they would have been allowed to return depended on their stated reason for returning and on the merits of their individual cases. *Andrews,* Tr. at 215-16. Since the testimony indicated that some controllers might have been permitted to return, we find that the presiding official inaccurately interpreted this testimony.

As to GENOT 1/128, upon which the presiding official also relied in her initial decision rendered in the *Anderson* consolidated initial decision, that notice simply stated that

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[4] Additionally, the appellants in the *Andrews* consolidated petition for review allege that Presiding Official Krueger lacked "that degree of experience required by" 5 U.S.C. § 7701(b) to hear their removal cases. Appellants have submitted no evidence in support of their assertion. Thus, we find no merit to appellants' allegation.

Also, appellant DeMar has requested an oral presentation before the Board. The record shows that this appellant was afforded a full evidentiary hearing before the presiding official, was represented by counsel, and testified in his own behalf. Further, appellant has failed to state a basis warranting the granting of his request. Therefore, appellant's request for an oral presentation before the Board is denied.

appellants who failed to return to work by their deadline shifts would be placed in a non-duty status and subsequently removed. There was nothing in that notice to prevent the agency from placing in a non-duty with pay status an employee who indicated his desire to return to work after his deadline shift. Here, the burden was on appellants to show by preponderant evidence that they were ready, willing, and able to return to work during the notice period, that they contacted an agency official with decision-making authority and unequivocally communicated their availability and desire to return to work, and that they were nevertheless refused readmission by the agency. *See Martel, supra,* at 11. None of the appellants covered in those consolidated initial decisions has thus shown. Therefore, we find that they were not suspended.[5]

Accordingly, the initial decision in *Anderson* is REVERSED with respect to appellant Anthony P. Tomasi and, as MODIFIED in this Opinion and Order, is AFFIRMED with respect to appellant David C. Anderson. The initial decision in *Andrews,* as MODIFIED in this Opinion and Order, is hereby AFFIRMED. The initial decision in *Lissak* is hereby AFFIRMED.

The agency is hereby ORDERED to cancel its removal action against appellant Tomasi and reinstate him to his position of Air Traffic Controller Specialist. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this Opinion. Any petition for enforcement of this Order shall be made to the

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[5] In the *Lissak* consolidated initial decision, the presiding official, relying on 5 C.F.R. §§ 1201.22 and 24, found the suspension issue untimely on the basis that those appellants failed to file, within 20 days of the alleged suspension, an appeal stating the nature of that action. Our review of the record shows that those appellants also failed to meet the *Martel* standard for constructive suspension

Chicago Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Secretary

NOV 28 1983
(Date)
Washington, D.C.

Attachment: Statement of the Board's policy on service of its opinions and orders.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES F. BEHENSKY, JR., et al.,
RICHARD J. BRANDIS, et al.[1]

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DOCKET NUMBERS CH075281F0979REM
CH075281F1066

Date: JUL 5 1985

BEFORE

HERBERT E. ELLINGWOOD, Chairman
MARIA L. JOHNSON, Vice Chair
DENNIS M. DEANEY, Member

OPINION AND ORDER

INTRODUCTION

This case is before the Board on the appellants' petitions for review of the presiding official's remand decision dated December 17, 1984, made pursuant to the Board's instructions for further findings on the creation, reliability and trustworthiness of certain records relied upon by the agency in taking adverse actions against the appellants herein.

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[1] Although a separate petition for review of the remand initial decision, dated December 17, 1984, was filed by each group of appellants, this case is being consolidated due to the similarity of issues and situations.

The appellants' Motion for Sanctions and to Strike Respondent's Opposition Brief to petition for review is hereby DENIED; and the agency's Motion for Reconsideration is hereby DENIED.

BACKGROUND

The appellants previously appealed the agency action removing them from their positions of Air Traffic Control Specialists at the Chicago Air Traffic Control Center in Aurora, Illinois (ZAU) based upon charges of participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and unauthorized absence (AWOL).

In their original appeals, the appellants argued that the sign-in logs contained in their appeal files contain discrepancies[2] when compared against the "original" logs (identified as Appellants' Group Exhibit #16); that the agency had "doctored" the sign-in logs in the appeal file in order to support the removal actions taken against the appellants (Initial Hearing Transcript (IHT) Vol. I. p. 114); and that no other evidence was presented as to when, if ever, the sign-in logs were changed, who changed them, or for what purpose they were changed.[3] Despite the fact that the logs, in some instances, contained alterations and succeeding entries,[4] the presiding official found

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[2] An example given of such discrepancy was the changing of an original notation of annual leave (AL) to AWOL.

[3] During the initial hearing in these cases, the agency sought to have Mr. Robert Miller, Personnel Management Specialist, testify concerning the apparent changes in the logs. The presiding official sustained an objection by appellants' counsel to Mr. Miller's testimony based upon his previous order that all witnesses, other than the appellants, be sequestered during the hearing. Mr. Miller had been present during the hearing as a technical advisor to the agency. IHT Vol. VI, pp. 79, 80, 83. The presiding official also sustained appellants' objections to permitting the record to remain open for additional agency witnesses, other than Mr. Miller, to testify concerning this issue.

[4] The agency admitted through counsel that the agency had updated the logs to reflect actual absenteeism. IHT VI, at 81

in his original initial decision that the agency established, through testimony of George Gunter, Facility Chief, that the logs were created in conjunction with the operations of ZAU and were properly relied upon in managing its work force. *See United States* v. *Foster,* 711 F.2d 871, 882 (9th Cir. 1983); *United States* v. *McPartland,* 595 F.2d 1321, 1348-1349 (10th Cir. 1979); *Peter Kewit Sons Co.* v. *Summit Construction Co.,* 422 F.2d 242, 268 (8th Cir. 1969). He went on to sustain the removal actions taken against the appellants. The appellants petitioned for review.

In its decision on appellants' petition for review of the original initial decision, the Board determined that three documents in each appeal file were of central importance to proving strike participation and AWOL: 1) the watch schedules; 2) the personnel sign-in logs, and 3) the time and attendance records ((T&A records). The Board concluded that since the agency did not in every instance prepare these records in the usual course of business, but rather under unusual circumstances and with some inaccuracies, further evidence and analysis were necessary to determine whether the records were sufficiently reliable to establish strike participation by the appellants. The case was, therefore, remanded to the presiding official for further adjudication with a suggestion that he consider the need for eyewitness testimony explaining the process by which the records were created.

INITIAL DECISION AFTER REMAND

At the remand hearing, the agency presented lengthy testimony of Robert Miller, who was the Facility Evaluations Officer for ZAU at the time of the strike. Over a period of several days, Mr. Miller testified as to the practices and procedures followed in the preparation and use of the documents in issue. He also described the operation of the data collection center, commonly referred to as the "war room", a control work area set up during

the second week of the strike to deal with administrative paperwork associated with the removal actions, oral replies, and the initial hearing. Remand Hearing Transcript (RHT) at 110-111.

Mr. Miller also testified concerning the differences between the documents contained in the appeal files and those submitted by appellants. He stated that any differences between the two sets of schedules were due to the fact that the copies in the adverse action files were made while the schedules were still operational, and that subsequent changes on the original schedules were made while "working" controllers were handling the increased workload occasioned by the strike. None of the appellants testified at the hearing, nor did they specifically state, either orally or in writing, that they were in fact either on duty or on approved leave or not scheduled to work at the time(s) the documents indicated they were absent. The presiding official found that a close examination of the documents reveals that no changes had been made to any appellant's scheduled shifts during the applicable period.[5] Based upon the further testimony of Mr. Miller and the other facility supervisors[6] regarding the procedures for posting and amending the watch schedules (RHT, 119), and the consistency of the documents, the presiding official concluded that the watch schedules were reliable, and, in the absence of any specific challenge by any of the appellants, accurately reflected the shift assignments for the appellants during the period in question.

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[5] This is the period beginning with August 3, 1981 and continuing through the date of each appellant's "deadline" shift (the first scheduled shift after 11:00 a.m. on August 5, 1985).

[6] The agency also presented the testimony of several area supervisors who testified regarding the preparation and use of the documents in general, and specifically identified the sign-in logs prepared by them.

With regard to the sign-in logs, appellants pointed to differences between the original logs (Appellants' Joint Ex. 9) and the copies contained in the adverse action files. The presiding official found that during the applicable period, however, such differences appeared with respect to only three of the appellants, Nelson, Lockhart and Schultz. RHT at 78. In each of these instances, the appellant's name had been added to a sign-in log by an employee working in the data collection center. This was done because the employee's name had been inadvertently omitted from the sign-in log for a shift to which he was assigned under the watch schedule. Remand Initial Decision (RID) at 5. The presiding official concluded that the presence or absence of an employee's *name* on a sign-in log, whether subsequently added or not, was not as significant as the presence or absence of the employee's *signature* on the document. He therefore found that inasmuch as none of the appellants' signatures appeared on the sign-in logs, the agency's addition of their names to the logs (obviously to show that the appellants were, at best, scheduled to work)[7] did not prejudice these appellants. The presiding official also found based upon testimony by the supervisors and his own examination, that an "inherent probability of trustworthiness" existed in these logs. RID at 5.

With regard to the T&A's, the record revealed that the vast majority of the amendments to those reports were in reference to the pay periods subsequent to an appellant's deadline shift. As the presiding official found, such

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[7] Mr. Miller stated that the most common "mistakes" on sign-in logs were created by shift swaps when an entire crew on a watch schedule is listed on one shift and a controller changes off that shift. Therefore, when putting down names from the watch schedule to the sign-in logs one might miss the shift swap of an individual and inadvertently list him on the wrong shift ". . . that was a common mistake." RHT.

changes are essentially irrelevant. RID at 5. As to the reports which covered the applicable period (August 3-5, 1981), the presiding official concluded that such changes, and T&A amendments in general, are not uncommon in the Federal sector and that the amended T&A reports accurately reflected each appellant's status during the applicable period. RID at 5. He also found no evidence of fraud, forgery or misrepresentations on the part of the agency, nor any persuasive evidence that any agency official perjured himself, attempted to "make" or "rig" a case against an appellant, or otherwise committed any act which might be considered fraudulent. RID at 6. Given the totality of circumstances, the presiding official concluded that the agency's documentary evidence was, in fact, reliable; that each of the appellants was absent without authorization (AWOL) on one or more days during the strike; that each appellant failed to report for his/her deadline shift; that the agency established a *prima facie* case of strike participation with respect to each appellant; and that none of the appellants presented persuasive evidence to rebut the agency's *prima facie* case. The presiding official, therefore, held that the charges against the appellants were supported by the preponderance of the evidence, and sustained each appellant's removal. RID at 8.

PETITION FOR REVIEW OF REMAND INITIAL DECISION

The appellants have now filed timely petitions for review of the presiding official's remand initial decision. They contend, *inter alia*, that the presiding official erred in permitting Mr. Miller to testify at the remand hearing as to the circumstances surrounding the creation of the agency documents since he had previously, at the initial hearing, denied the agency request to call him as a witness because he had not been sequestered as were other witnesses, and that the presiding official's decision permitting him to testify was, therefore, a violation of Rule

615 of the Federal Rules of Evidence. Appellants also contend that the agency destroyed the original watch schedules and swap books; that the presiding official erred in his credibility assessment of agency witnesses; and that the presiding official was biased and prejudiced. These contentions are without merit.

In reference to appellants' contention that the presiding official erred in permitting Mr. Miller to testify at the remand hearing, the record reveals that the presiding official allowed Miller to testify because: (1) the agency's failure to sequester him did not constitute a willful or intentional violation of the sequestration order; (2) under the third exception of Rule 615 of the Federal Rules of Evidence, Miller was "a person whose presence is shown by a party to be essential to the presentation of his case"; and (3) there was not a likelihood that Miller's testimony would be shaped in a manner prejudicial to the appellants by virtue of his having heard the testimony of the other witnesses. (Notice of Hearing and Order, Remand File, Tab 19.) The Board finds the presiding official's stated reasons to be reasonable and can discern no error or abuse of discretion on the part of the presiding official in this regard. Appellants allege, in essence, that since the presiding official ordered the witnesses at the first hearing sequestered and Mr. Miller remained in the hearing room during the proceedings, he should not have been permitted to testify at the remand hearing.[8] Since strict adherence to the Federal Rules of Evidence is not mandatory in administrative proceedings, this contention must also be rejected. *See, e.g., Davies* v. *Department of Agriculture,* 5 MSPB 291 (1981). A perusal of the specific language of Rule 615 makes it clear, however, that even under a strict application of the rules of evi-

[8] At the initial hearing the presiding official excluded Mr. Miller's testimony, but on remand, permitted Mr. Miller to testify.

dence, the exclusionary rule does not authorize the exclusion of a person whose presence is shown by a party to be essential to the presentation of his case. *In re United States,* 584 F.2d 666 (5th Cir. 1978). A review of the record in this case discloses that Mr. Miller's presence in the hearing would have been appropriate under this exception.

Additionally, in a case somewhat similar to the instant case, the United States Court of Appeals for the Fifth Circuit concluded that the district court did not err when it permitted the government to use a postal inspector as its final witness after he had been permitted to remain in the courtroom to assist the prosecutor during the testimony of other witnesses. The court opined that the district court did not abuse its discretion in permitting the inspector's testimony which principally related to matters peculiarly within his personal knowledge. *United States* v. *Nix,* 601 F.2d 214 (5th Cir. 1979).

It was, therefore, appropriate for the presiding official, in order to assess the reliability of agency records, to determine that eyewitness testimony was required to further explain the process by which those records were created. Notwithstanding the fact that Mr. Miller, who was the agency's technical representative, remained in the hearing subsequent to a sequestration order at the initial hearing, the presiding official determined, over appellants' objections, that since Mr. Miller was in charge of the data collection center where the administrative paperwork was processed, he had firsthand knowledge of the entire recordkeeping process and that his testimony at the remand hearing was essential. The presiding official's decision to permit Mr. Miller to testify under these circumstances, despite his prior sequestration order, was not an abuse of discretion. *United States* v. *Bobo,* 586 F.2d 355 (5th Cir. 1978); *United States* v. *Johnston,* 578 F.2d 1352 (10th Cir. 1978).

As to appellants' contention that the agency destroyed the original watch schedules and swap books, the pre-

siding official evaluated documents, weighed their probative value, and determined that any subsequent changes on the watch schedules contained in the adverse action files were made while working controllers were handling the increased workload occasioned by the strike. The presiding official found the documents reliable and an accurate reflection of appellants' shift assignments during the period in issue. *Borninkhof* v. *Department of Justice,* 5 MSPB 150 (1981). In any event, a close examination of these documents reveals that no changes were made to any appellant's scheduled shifts during the applicable period of August 3, 1981 through August 5, 1981. The Board finds no error in the presiding official's evaluation of the reliability of these documents.[9]

The appellants have also raised specific arguments regarding the removals of appellants Peacock and Reedy. These arguments were considered and adequately addressed by the presiding official in his original initial decision. These arguments represent mere disagreement with the presiding official's finding of fact. Since we find no error in the presiding official's reasoning with regard to these issues, we decline to disturb his findings. *See Weaver* v. *Department of the Navy,* 2 MSPB 297 (1980); *see also Anderson* v. *Department of Transportation,* MSPB Docket No. SL075281F0347 (April 25, 1983), *aff'd.* 735 F.2d 537 (Fed. Cir. 1984) (employee's obligation to contact the agency for clarification when confused about returning to work); *Martel* v. *Department of Transportation,* MSPB Docket No. BN075281F0558 (April 25,

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[9] As the Board has previously noted, while the "best evidence" rule has some applicability in Board proceedings, the real issue is whether the record contains adequate, competent and reliable evidence to support the agency's charges. *See e.g. Jones* v. *Department of Agriculture,* MSPB Docket No. CH07528110391 (January 23, 1984); *Natividad* v. *Department of Agriculture,* 5 MSPB 426 (1981).

1983) *aff'd.* 735 F.2d 504 (Fed. Cir. 1984) (employee must prove that he was "ready, willing and able" to report for duty and had so advised the agency).

As to the remaining matters raised by appellants in their petitions for review, the Board has previously resolved those issues in: *Stone* v. *Office of Personnel Management,* 5 MSPB 142-43 (1981) (ruling on motions and the imposition of sanctions is a matter for the presiding official's sound discretion); *Karapinka* v. *Department of Energy,* 6 MSPB 114, 115-16 (1981) (procedural error by a presiding official); *Prime* v. *U.S. Postal Service,* 5 MSPB 110 (1981) (the mere fact that a presiding official does not rule on motions or accept the assertions of an appellant in the fashion an appellant would desire does not constitute bias, prejudice or impropriety); *Weaver* v. *Department of the Navy, supra.* (due deference is accorded to the presiding official's factual and credibility assessment of witnesses); *Book* v. *U.S. Postal Service,* 6 MSPB 322 (1981), *aff'd.* 675 F.2d 158 (8th Cir. 1982) (a presiding official is not precluded from drawing adverse inferences when an appellant refuses to testify in response to probative evidence against him); *Desiderio* v. *Department of the Navy,* 4 MSPB 171 (1980) (AWOL alone is cause for removal); *Schapansky* v. *Department of Transportation,* 12 MSPB 141 (1982) *aff'd.* 735 F.2d 477 (Fed. Cir. 1984) (*prima facie* case of strike participation and reasonableness of removal penalty).

Accordingly, having fully considered the appellants' petitions for review of the presiding official's remand initial decision issued on December 17, 1984, and finding that they fail to meet the criteria under 5 C.F.R. § 1201.115, the Board hereby DENIES the petitions.

This is the final order of the Merit Systems Protection Board in these appeals.[10] 5 C.F.R. § 1201.113. The remand

[10] Appellants affected by this decision are listed in the attached Appendix A.

initial decision shall become final five (5) days from the date of this order.

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after receipt of this order.

FOR THE BOARD:

/s/ Illegible
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Richard S. Delutri	Decision Number: CH075281F1377
Robert A. Edwards	Decision Number: CH075281F1454
Alan W. Gerbitz	Decision Number: CH075281F1637
Ronald W. Gillette	Decision Number: CH075281F1649
Michael S. Kline	Decision Number: CH075281F2076
Thomas J. McNeal	Decision Number: CH075281F2362
Raymon E. Owens	Decision Number: CH075281F2572
Dana J. Thomas	Decision Number: CH075281F3108
v.	Date: January 21, 1983

Department of Transportation
Federal Aviation Administration

INTRODUCTION

By petitions filed between September 5 and October 12, 1981, the above-named appellants appealed actions whereby the Department of Transportation, Federal Aviation Administration, Chicago Air Route Traffic Control Center (ARTCC), Aurora, Illinois, removed them from their positions as Air Traffic Control Specialists. Mr. Delutri was removed effective September 9, 1981, Mr. Edwards effective September 5, 1981, Mr. Gerbitz effective September 8, 1981, Mr. Gillette effective September 29, 1981, Mr. Kline effective October 26, 1981, Mr. McNeal effective August 27, 1981, Mr. Owens effective September 14, 1981, and Mr. Thomas effective September 19, 1981, Their appeals, which were timely filed to the Board, were consolidated by an Order entered on August 25, 1982. Each appellant seeks to have the removal action set aside.

JURISDICTION

The appellants, employees in the competitive service who have completed more than one year of current continuous service in the same position, are entitled to appeal a removal action to the Merit Systems Protection Board

(Board). *See* 5 U.S.C. 7511(a)(1)(A), 7512, and 7513(d) (1980); and 5 C.F.R. 752.401(a), .401(b)(1), and .405(a) (1981).

ANALYSIS AND FINDINGS

In all of these cases, the appellants were advised of a proposal to remove them on the basis of two charges: (1) violating 5 U.S.C. 7311 (1980), which bars government employment for an individual who participates in a strike, and 18 U.S.C. 1918 (1970) which makes participation in a strike against the government a crime for which a sentence of imprisonment can be imposed; and (2) unauthorized absence on specified dates during an illegal strike. The agency found in its decision notices that its charges warranted removing the appellants from their positions.

When an employee appeals an adverse action to the Board, the Board must review the action to determine whether the underlying cause for the action actually occurred, and if it did occur, the Board must next determine whether the disciplinary action taken will promote the efficiency of the service. *See* 5 U.S.C. 7701(c)(1)(B), 7513(a) (1980); 5 C.F.R. 1201.56(a) (1981). In addition, the Board is required to review and consider any affirmative defenses raised by an appellant which are based on harmful procedural error, prohibited personnel practices or violations of law. *See* 5 U.S.C. 7701(c)(2) (1980); and 5 C.F.R. 1201.56(b) (1981).

Strike Participation Charge

With respect to the first charge, the agency must prove by a preponderance of the evidence that a strike called by the Professional Air Traffic Controllers Organization (PATCO) was in progress from August 3 through August 20, 1981, covering the dates these appellants were allegedly on strike. The Board has taken official notice of the fact that a strike by PATCO members against the Federal Government began on August 3, 1981, and continued through August 6, 1981, and found that such strike was illegal. *Ketchem* v. *Department of Transportation,* MSPB

Docket No. DA075281F0713 at 9 (May 28, 1982). Since none of the appellants have, on appeal, refuted the existence of a strike during the period from August 3 thhrough 6, 1981, I find that a strike against the government by air traffic controllers at appellants' air traffic facility occurred from August 3 through August 6, 1981.

Since I have not taken official notice of the existence of a strike beyond August 6, 1981, the agency is responsible for establishing, by a preponderance of the evidence, that the strike continued following those dates. The appellant in this consolidated group with the latest scheduled reporting date after August 3, 1981 is Michael Kline, and I will determine if the strike continued through the date that he was scheduled for duty. If it can be determined that the strike lasted at least that long, then it necessarily follows that each of the appellants was scheduled for duty during the strike.

Appellant Kline was on annual leave at the time of the strike, and his first regularly scheduled workday following August 3, 1981 was on August 20, 1981. The appellants argue that the strike was not continuing as of that date since a great majority of controllers at the facility had already been "locked out" of the facility when they failed to appear for their first regularly scheduled shift on or after 10:00 a.m. August 5, 1981,[1] and that since they could no longer report to work, they were no longer withholding their services from the agency in a strike.

The classic definition of a strike is stated in the case of *United Federation of Postal Clerks* v. *Blount,* 325 F. Supp. 879, 884 (D.D.C.), *aff'd,* 404 U.S. 802 (1971), where the court stated that the "essence" of striking "is (the) actual refusal in concert with others to provide services to one's employer." It is apparent that only a relatively small number of air traffic controllers at the Aurora ARTCC facility were due to report to work on or after August 20, 1981 and failed to report as scheduled. It

[1] This is designated the "deadline shift".

must be remembered, however, that the PATCO strike was a nationwide strike, so the actual number of employees who could have returned to work at various air traffic facilities on or after August 20, 1981 was undoubtedly much larger than the employees who could have reported at the Aurora ARTCC. Appellant Kline's alleged refusal to return to work as scheduled, even though such refusal may have been in concert with fewer employees than those who were earlier scheduled for work, still may be properly characterized as an action which was in concert with others. . . ." Moreover, although the appellants argue that agency officials declared the strike to be over, the union itself had not declared the strike to be over on or before August 20, 1981, and union members engaged in strike-related activities, including picketing, well beyond August 20, 1981. (Tr: Vol. 1 p. 227). Accordingly, I find that in view of the continuing failure of employees to report for work and the other evidence of the continuing strike, that a preponderance of the evidence establishes that the strike continued through at least August 20, 1981.

With respect to these appellants' alleged participation in the strike, the agency must first establish a *prima facie* showing of participation. *See Schapansky* v. *Department of Transportation, Federal Aviation Administration,* MS PB Order No. DA075281F1130 (October 28, 1982); *Jones* v. *Tennessee Valley Authority,* MSPB Order No. AT0752-8010300 (February 19, 1982); and *Duckett, et al.* v. *Tennessee Valley Authority,* MSPB Order No. AT07528010325 (February 19, 1982).[2] A *prima facie* showing is made when the agency demonstrates: (1) a labor organization called a strike at the facility where the employee worked; and (2) the employee failed to appear for scheduled duty while the strike was in progress.

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[2] *Jones* and *Duckett* concern participation in an unauthorized work stoppage in violation of a labor agreement and 5 U.S.C. 7311. I find the reasoning in these cases is relevant to determining what constitutes a *prima facie* showing of participation in a strike.

The record evidence shows that the appellants were members of the bargaining unit represented by PATCO, the labor organization that called the strike in question, by virtue of their positions as air traffic control specialists. The evidence also shows that each of the appellants was absent from duty on his deadline date. (Tr: Vol. 1, pp. 59-60; Vol. 1, pp. 153-4; Vol. 1 pp. 156-7; Vol. 1 pp. 63-4; Vol. 1 pp. 220-3; Vol. 2 pp. 5, 7; Vol. 1 pp. 124-5; Vol. 2 67). Accordingly, I find that the agency has established a *prima facie* showing that the appellants were participating in the PATCO strike on specified dates between August 3 and August 20, 1981.

An appellant has the opportunity to refute the agency's *prima facie* showing that he participated in the strike by demonstrating that he had no knowledge of the existence of the strike or by establishing that his absence was due to some factor other than intentional participation in the strike. An absence of rebuttal evidence or the overriding of rebuttal evidence by the agency would result in the agency meeting its burden of proof with respect to participation in the strike *See Schapansky,* at 6. I will now discuss each appellant's defense to the strike participation charge.

* * *

Richard Delutri

Appellant Delutri testified that he was unable to work during the strike because he was ill. This appellant had a chronic problem with his left shoulder, diagnosed as tendonitis,[5] and had received treatment for this condition for over a year prior to the strike. He testified that on August 2, 1981, while playing golf, he hurt his shoulder. He further testified that he was in such pain that he took medication that contained codeine. This medication had been prescribed for appellant Delutri in July 1981. (Tr: Vol. 4 pp. 165-6).

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[5] After the close of the record, appellant Delutri submitted information that discloses that this problem has recently been diagnosed as a high cervical intramedullary spinal cord tumor.

The next day, August 3, appellant Delutri attempted to contact his supervisor, William Plasch. The appellant testified that he eventually spoke with someone at the facility's watch desk. This person told the appellant that supervisor Plasch was unavailable and that sick leave was not being approved. Delutri explained that he was taking codeine and would not be able to work until Saturday, August 8. Appellant Delutri testified further that he expected supervisor Plasch to be given this message and that he would be put on sick leave. (Tr: Vol. 4, pp. 170-1). The agency, which stipulated that it did not have a log of all calls made on August 3 but that it did keep a record of all significant calls made to it on that day, does not have a record of this call. (Tr: Vol. 4, p. 188). The appellant later on August 3 tried to reach Plasch at home, and Plasch confirmed that he received a message on August 5 or 6 that the appellant had called but when he tried to return the call, he was not able to reach the appellant. (Tr: Vol. 4, p. 116). Since the agency had no record of appellant's Delutri's request for leave, it issued his proposed removal letter on August 5.[6]

This appellant testified that he called his doctor on August 3 but that he was not able to get an appointment until August 10. (Tr: Vol. 4, p. 173). This appointment was later postponed by the doctor until August 17. His doctor testified that he did not recall the appellant mentioning any information on August 17 regarding an episode of severe pain; but he did testify, from his records, that the appellant was ". . . apparently getting along all right. . . ." (Tr: Vol. 4, p. 147). The doctor's notes also indicate that the appellant told him on August 17 that

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[6] The proposed removal letter charges appellant Delutri with missing the 1:00 p.m. shift beginning on August 3, 1981. Since the proposal is dated August 5 and clearly states he is charged with missing his shifts beginning August 3 at 1:00 p.m. and continuing until the present, I find that this proposal included his deadline shift on August 5 at 1:00 p.m.

his shoulder was improved after the July 1981 treatment. (Tr: Vol. 4, p. 140).

Chief Gunter testified concerning his policy for denying all requests for sick leave during the strike. This appellant contends that this policy violated the collective bargaining agreement. Even assuming, for the sake of argument, that this policy did violate the collective bargaining agreement, appellant Delutri has not demonstrated that he ever requested leave from his supervisor, William Plasch, or anyone else who had authority to authorize his sick leave under normal circumstances.

I find that appellant Delutri has not rebutted the *prima facie* case of strike participation. He has not demonstrated that he ever effectively communicated his request for sick leave to the agency. Because of the emergency situation in existence and the fact that he was requesting a number of days off, I find that this appellant should have made further attempts to notify the agency of his problem. Additionally, the evidence demonstrates that the appellant did not see his doctor until August 17. I note that I considered the results of a polygraph test given to appellant Delutri. However, I gave this evidence little weight in reaching my decision because the polygraph examiner was not called as a witness and subjected to cross-examination, and there were certain ambiguities in his report. *See Meier* v. *Department of the Interior,* 3 MSPB 341 (1980). Accordingly, I find that the agency has supported its charge of strike participation by appellant Delutri by a preponderance of the evidence.

* * *

Unauthorized Absence Charge

As noted above, the second charge against each appellant in the consolidated group is "absence without authorization (leave)" (AWOL). Some appellants in this consolidated group were charged with AWOL only for the day of their deadline shifts, while others were charged with AWOL for the day of their deadline shifts as well as days missed earlier in the strike.

The fact of the appellants' absence and their AWOL status during those days for which they were charged is established by the documentary evidence submitted by the agency and by chief Gunter's testimony. However, a further element of this charge, which the agency must also establish by a preponderance of the evidence, is the propriety of the agency's action in denying the appellants approved leave during the period of their absence. *See McDonough* v. *U. S. Postal Service*, 4 MSPB 441 (1980). As stated by the Board in the case of *Giesler* v. *Department of Transportation*, 3 MSPB 367 (1980), an agency clearly has the right to expect its employees to attend their regularly scheduled tours of duty, "absent a valid excuse"

Appellant McNeal has established, as analyzed in the above discussion, a valid excuse for his absence, that is, his sick leave was wrongfully denied. Appellants Kline and Gillette have also established valid excuses for their absence: they were on uncancelled annual leave and would not have been permitted to return to work for their deadline shifts. I find, therefore, that with respect to these three appellants, the agency has failed to establish, by a preponderance of the evidence, the propriety of its action in placing these appellants on AWOL status for the period charged. Hence, the AWOL charge for appellants McNeal, Kline and Gillette is dismissed and will be given no further consideration in this decision.

The remaining appellants in this consolidated group, appellants Delutri, Edwards, Gerbitz, Owens, and Thomas did not establish, as analyzed in the above discussion of the strike charges, a "valid excuse" for their absences from their regularly scheduled shifts. It should be noted, with respect to appellant Thomas, that emergency annual leave, unlike sick leave, is granted at the agency's discretion, and can be validly denied in the context of a strike. (Appellant Delutri Exhibit 1, FAA/PATCO Collective

Bargaining Agreement, Article 31, Section 2.) Accordingly, I find that the agency has established, by a preponderance of the evidence, the propriety of its action in placing each of these appellants in an AWOL status for the period charged. Since the agency has supported each element of its AWOL charge against each of these appellants by a preponderance of the evidence, I find that the agency's second charge is sustained against appellants Delutri, Edwards, Gerbitz, Owens, and Thomas.

Efficiency of the Service and Penalties

In addition to proving both charges against appellants Delutri, Edwards, Gerbitz and Owens and its AWOL charge against appellant Thomas, the agency must also show that removing the appellants was for such cause as will promote the efficiency of the service. The Board has found that strike participation has a negative effect on efficiency because such conduct impairs an employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its mission. *Schapansky,* at 11-12. The Board has also found that unauthorized absences from duty constitute proper grounds for taking disciplinary action because such absences by their very nature disrupt the efficiency of the service. *Desiderio* v. *Department of the Navy,* 4 MSPB 171 (1980). Moreover, the evidence here shows aggravated employee misconduct because large numbers of controllers were absent at the Aurora ARTCC during the PATCO strike. Unauthorized absences as part of a strike action constitute one of the most disruptive types of absence employees can direct toward their employer and clearly warrant disciplinary action. I conclude that the sustained charges constituted such cause for removal as will promote the efficiency of the service with respect to appellants Delutri, Edwards, Gerbitz and Owens and as I will discuss below not with respect to appellant Thomas.

The scope of the Board's review of the agency's selection of a penalty was discussed in *Douglas* v. *Veterans*

Administration, MSPB Docket No. AT075299006 (April 10, 1981). After noting that a penalty should be selected only after the relevant factors have been weighed, the Board held that the purpose of its review is to ensure that the agency conscientiously considered the relevant factors, and in choosing the penalty, struck a responsible balance within the limits of reasonableness.

With respect to appellant Thomas, against whom only the AWOL charge was sustained, a very important factor to consider under a *Douglas* analysis is the gravity of his conduct. His absence during a period of crisis in the agency was a serious breach of his relationship with the agency and this misconduct warrants a severe penalty. Notwithstanding this, appellant Thomas' misconduct must be excused to some extent by his concern for his seriously ill father. Other positive factors that should be considered are: the absence of any evidence of past disciplinary record and the fact that the AWOL charge does not reflect on the appellant's ability to return to his job and perform adequately. Suggested penalties for a first offense of AWOL under normal circumstances range from a letter of reprimand to a three-day suspension. However, appellant Thomas' absence during this emergency situation justifies a more severe penalty than that suggested for an unauthorized absence under normal conditions. Accordingly, I find that the maximum reasonable penalty for appellant Thomas is a 60-day suspension.

I have also reviewed whether appellants Delutri, Edwards, Gerbitz and Owens are entitled to have their removals mitigated to a lesser penalty in accordance with *Douglas.* In these cases the most important factor is the gravity of the appellants' misconduct. Their absence in the context of a strike destroyed their relationship of trust with the agency. Factors such as length of service and quality of past performance are not important here because of the overriding factor of the gravity of this conduct. *Schapansky,* at 11. Clearly, the penalty of re-

moval is within the tolerable limits of reasonableness here. Accordingly, I will not disturb the removal penalty with respect to appellants Delutri, Edwards, Gerbitz, and Owens.

Affirmative Defenses

Notwithstanding my finding that the AWOL charge against appellant Thomas and both charges against appellants Delutri, Edwards, Gerbitz, and Owens have been sustained, it is necessary to evaluate various affirmative defenses to the agency actions which have been raised on appeal by these appellants since, by statute and regulation, an agency action may not be sustained, even if supported by the requisite burden of proof, if it was used on harmful procedural error, a violation of law, or a prohibited personel practice. 5 U.S.C. 7701(c)(2); 5 C.F.R. 1201.56(b). Appellants have the burden of establishing, by a preponderance of the evidence, affirmative defenses that they propound. *James* v. *Department of the Navy*, MSPB Docket No. PH07528010141 (July 30, 1981).

The appellants raised several issues that I interpret to be claims that the agency committed harmful procedural error[17] in processing their removal actions. Specifically, the appellants claim that: (1) the agency improperly invoked the "crime provision" to shorten the advance notice period for considering proposed adverse actions; (2) the agency improperly placed the appellants in a non-duty status pending the outcome of these actions; (3) the agency's offer of reply was an empty formality;

[17] The Board's regulations found at 5 C.F.R. 1201 define harmful error as: "Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights."

(4) their cases were prejudged by virtue of government officials' prior orders to remove them; and (5) the agency's language in the letter of proposed removal regarding possible decertification of PATCO wrongfully foreclosed the appellants' use of the grievance procedure.

The Board has considered the agency's reliance on the crime provision of 5 U.S.C. 7513(b) (1980)[18] to shorten the 30-day period of advance written notice or adverse action in these cases. *Schapansky*, at 7-8. The Board found that the agency reasonably invoked the crime provision to shorten the notice period in a case comparable to the cases in question because 18 U.S.C. 1918 (1970) provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because the agency had reasonable cause to believe an employee who did not report for scheduled duty during a strike was participating in the strike. Accordingly, based upon this reasoning, I find that the agency reasonably invoked the crime provision in these cases. The appellants have failed to prove any error in this regard and, therefore, this allegation has no merit.

The appellants also alleged that they were improperly placed in a non-duty status as of the date of their letters of proposed removal. They also contend the agency's denial of their requests for 16 hours of official time to prepare their defenses was harmful. However, I find that even if the agency had carried these appellants in a duty status and granted them official time to prepare defenses,

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[18] That statutory provision reads, in pertinent part, as follows:

> An employee against whom an action is proposed is entitled to . . . at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action. . . .
>
> 5 U.S.C. 7513(b).

there is no reason to believe that the agency would have reached a different conclusion in these cases. Therefore, I find this claim of harmful error to be without merit.

The appellants next allege that the agency's offer of an oral reply was an empty formality because they were denied extensions of time to reply, they were not provided with meaningful responses to their requests for clarification of the agency's charges and copies of the documents the agency relied on in reaching its decision, and they were allowed to review this documentation for the first time at the oral reply. My review of the record finds no basis for determining the agency erred in its handling of the reply process. The appellants have not shown that had they been granted more time for response, additional materials to review or additional time to review documentation, they would have presented replies that could have changed the outcome of the agency's actions. Nor have the appellants shown that they have since been able to obtain facts not in their possession at their oral replies that can help them explain their failure to report for scheduled duty during the strike.

Additionally the appellants assert that the oral reply itself was a sham because the oral reply officials had received no training for this role, had no authority to grant continuances, and had no authority to make final decisions or to recommend final decisions. I find no harmful error in the way the oral replies were conducted. A trial-type hearing is not contemplated by 5 U.S.C. 7513(c) (1980) which provides for an oral reply. *See Arnett* v. *Kennedy*, 416 U. S. 134 (1974). The purpose of the oral reply is to give the employee an opportunity to respond to the charge, and I find that these appellants were given this opportunity. It is undisputed that the oral reply officials did not have final decision-making authority; however, they did make recommendations for "further agency discussion" of individual cases if they felt the facts obtained at the reply warranted this and these recommendations

were considered in the final decisions. Clearly the oral replies were handled in an expedited fashion because of the large numbers involved, but I find no harmful error concerning the oral reply process.

The appellants also claimed that their cases were prejudged by virtue of government officials' prior orders to remove them. My review of the record finds no persuasive evidence that the removal actions in these cases were prejudged. The appellants presented no evidence that President Reagan or other Washington officials directed their individual removals. On the other hand, chief Gunter repeatedly testified that he made the decision in each of the cases in question. The chief used standardized letters due to the large number of removals. The memoranda issued by the agency's national and regional offices[19] were guidelines and not directives. These guidelines set forth factors the chief was to weigh and gave him the authority to judge credibility. He was to exercise sound management discretion. Accordingly, I find that the decisions in these cases were not prejudged and this allegation cannot be sustained.

Finally, appellants argue that the agency's notice of decision to remove impermissibly chilled or misled them concerning their exercise of union rights by qualifying their access to the negotiated grievance procedure. The letter stated in relevant part:

> If . . . you believe this action violates Article 69 and you choose to file a grievance, you must submit a written grievance to me . . . no later than 15 calendar days after the effective date of the removal.
>
> In this connection, you should know that the FAA has filed an Unfair Labor Practice (ULP) charge against PATCO for its role in the strike and is seeking to have the union decertified. The case is now being processed by the Authority and determination

[19] E.g., GENOT 141.

> that PATCO committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement if the Union is decertified and the agreement terminated this avenue of appeal may not be available to you.

While the language of the notice goes beyond merely informing appellants of the existence of the contract machinery for attempted resolution of their appeals, I do not find the language to be either misleading or chilling. To the contrary it accurately describes the state of affairs existent during August 1981. Indeed the implications of decertification of the union suggested in the notice ultimately bore fruit. *Professional Air Traffic Controllers Organization and Federal Aviation Administration,* 7 FLRA No. 10 (1981). *PATCO* v. *Federal Labor Relations Authority,* 685 F.2d 547 (D.C.C. 1982). The appellants claim that in the event of decertification, their grievances would have survived because equity can provide a trustee, receiver, or successor union to assume its duties and protect the vested rights of its members. Furthermore, many of the appellants testified that but for the language quoted above, they would have filed grievances because they believed that would have been a speedier process. I find both of these contentions to be speculative and since I have found the language of the letter to be accurate, I find no error here.

Conclusion

In conclusion, I have found that the agency supported its removal action against appellants Delutri, Edwards, Gerbitz, and Owens by a preponderance of the evidence, and that their removals are for such cause as will promote the efficiency of the service. Since I have found that the appellants' affirmative defenses are without merit, I find that their removals must be sustained.

I have further found that with respect to appellant Thomas, only the unauthorized absence charge is supported and sustained by a preponderance of the evidence.

His removal for this charge will not promote the efficiency of the service, and I found that the maximum reasonable penalty here is a 60-day suspension. Appellant Thomas also did not meet his burden of proof with respect to his allegations of harmful error.

Finally, I have found that the agency has not supported and sustained its charges against appellants Gillette, Kline, and McNeal.

DECISION

The removal actions concerning appellants Delutri, Edwards, Gerbitz and Owens are affirmed. The removal of appellants Gillette, Kline, and McNeal is reversed. The removal of appellant Thomas is reversed and the agency is ordered to cancel the removal action and substitute in its place a sixty (60) day suspension. The agency is ordered to furnish to the Chicago Regional Office not less than ten (10) days after this decision becomes final, appropriate documentation that the corrective actions concerning appellants Gillette, Kline, McNeal and Thomas have been taken.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 25, 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N. W., Washington, D.C. 20419, no later than thirty-five (35) calendar days after the issuance of the initial decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the regional office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the requirements of 5 C.F.R. 1201.181 (d).

For the Board:

/s/ Judith Krueger
Judith Krueger
Presiding Official